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No. 01-1289

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL,

Respondents.

ON WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The Defense Research Institute ("DRI") is an organization with more than 21,000 individual lawyer and 400 corporate members throughout the United States. It seeks to advance the cause of the civil justice system in America by ensuring that issues important to the defense bar, to its clients and to the preservation and enhancement of the judicial process are properly and adequately addressed.

These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of law, through testimony before Congress and state legislatures on select legislation impacting the civil justice system, and by participation as amicus curiae on issues of significance to the defense bar and its clients. DRI provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.

Both parties provided written consents to the filing of this brief.[1]

SUMMARY OF ARGUMENT

A corporate defendant has a due process right to "fair notice" that specific conduct it engages in could be a basis for the entry of punitive damages. If the Utah Supreme Court's improper interpretation of this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) is

1. Pursuant to Rule 37(6) of the Supreme Court of the United States, DRI states that counsel for Petitioner and Respondent had no part in authoring any portion of this brief. No one other than DRI made a monetary contribution to the preparation or submission of this brief.

allowed to stand, it will fundamentally alter and undermine important principles of due process by holding that there is no required nexus between the alleged injury to a plaintiff and the specific conduct of a defendant that leads to a punitive damage award.

The Utah Supreme Court improperly reinstated an enormous punitive damage award based on evidence of conduct virtually all unrelated and dissimilar to the conduct allegedly directed to plaintiffs and giving rise to their claim. Instead of the kind of similar conduct envisioned by *BMW*, plaintiff proffered evidence of defendant's alleged nationwide conduct over a twenty year period of time. Such evidence of clearly dissimilar, "out-of-state" and temporally remote conduct of defendant had no relationship to the conduct complained of by plaintiffs, and, as such, should not have been presented to the jury as a basis for the entry of punitive damages. A defendant should never be held liable for punitive damages based on conduct which is wholly unrelated to its alleged wrongful conduct toward the plaintiff in an individual case, and which was lawful when undertaken. Furthermore, *BMW* recognizes that conduct of the defendant corporation must be directed toward citizens of the state in which the lawsuit is brought in order for such conduct to serve as the foundation for a punitive damage award. Additionally, for conduct to act as a springboard for punitive damages it must be temporally proximate to the bad conduct which plaintiffs purportedly suffered.

The Utah Supreme Court's decision ignores the requirement in *BMW* that there must be a qualitative and geographic relationship between the conduct in the individual case and the evidence admitted on the issue of punitive damages. As such, the Utah Supreme Court's holding permits admission of 'evidence' of a so-called twenty year "pattern" or "scheme" of alleged divergent nationwide business practices that bore no qualitative resemblance, nor geographic

or temporal relationship, to the conduct complained of by the plaintiffs in the instant case. Such an approach invites calling any conduct, even though remote in time, which jurors might find offensive, a "pattern" or "scheme", no matter how different it is from that directed to the individual plaintiffs. Evidence of such unrelated and dissimilar, out-of-state conduct should not have been allowed to form the basis of a punitive damage award against State Farm — to do so violates fundamental due process rights.

In addition, the verdict in this case is excessive under the standards set forth in *BMW*. The award of $145 million is roughly 145 times higher than the compensatory award to plaintiffs. Any fair reading of the *BMW* guideposts to determine whether the severity of a punitive award meets constitutional muster would find this award excessive. Allowing such an irrationally excessive ratio to stand would encourage the award of punitive damages with unreasonable ratios, both in Utah and across the country, rendering *BMW* and its progeny meaningless. The problems with the 145 to 1 ratio are compounded by the Utah Supreme Court's unconstitutional reliance on defendant's purported 20 year nationwide "pattern" of conduct, which was not only almost entirely unrelated to the conduct alleged to involve the Campbells, but which was clearly lawful in the states in which the conduct occurred. In addition, the punitive award of $145 million in this case bears no reasonable relationship to the level of punishment that could be imposed on State Farm for a violation of Utah law with respect to its handling of the third-party claim against Mr. Campbell. The issue of the quantitative disparity between the compensatory and punitive awards is integrally bound together with the Utah Supreme Court's decision to qualitatively and unconstitutionally prejudice defendant by allowing plaintiffs to string together 20 years of unrelated, dissimilar business practices in other states as evidence to support this punitive damage award.

ARGUMENT

I. The Utah Supreme Court's Ruling Effectively Eliminates a Corporate Defendant's Right to Fair Notice of What Acts of the Corporation Can Be Admissible for Purposes of Awarding Punitive Damages, in Direct Contravention of *BMW*.

Corporate defendants have a right to be protected from defending every act of the corporation in every case filed against them. If the decision of the Utah Supreme Court is allowed to stand this "shotgun" approach will become the rule. The potential economic impact of giving plaintiffs and juries *carte blanc* in terms of the disparate types of evidence admissible as a basis for astronomical punitive damages awards is incalculable. Importantly, there is no conceivable way the defendant would have any notice, much less fair notice, that the conduct complained of would merit punitive damages at all. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. This "fair notice" requirement is rendered meaningless by the breadth of the Utah Supreme Court's decision supporting the wholesale admission of evidence of unquestionably dissimilar and unrelated out-of-state conduct over a 20 year time frame for the purpose of supporting an award of punitive damages.

A. The Utah Supreme Court's Ruling Impermissibly Violates Fundamental Due Process Principles by Effectively Eliminating the Requirement that Plaintiffs Must Demonstrate that Evidence of Corporate Conduct is Related to the Facts of their Individual Cases in Order to be Admissible on the Issue of Punitive Damages

The decision of the Utah Supreme Court effectively eliminates any requirement that evidence of corporate misconduct be directly related to the alleged wrong perpetrated against the individual plaintiff in their case. By improperly characterizing evidence of State Farm's conduct in other jurisdictions and other strikingly different situations, as a "pattern" or "scheme", the Utah Supreme Court allowed admission of evidence of completely unrelated and dissimilar conduct by State Farm that bore no resemblance or nexus to the conduct complained of by plaintiffs in the underlying case. Such evidence of unrelated, dissimilar conduct should not be admissible in any phase of a lawsuit, and certainly not in the phase set aside for the assessment of punitive damages. If this case is affirmed, corporate defendants will be stripped of basic due process protection in future litigation of punitive damages by forcing them to defend against virtually any and all perceived acts of corporate misconduct, malfeasance or mistake for time periods and geographic locations vastly different from the actual complained of acts giving rise to plaintiff's case.

It is clear that every bit of evidence regarding every conceivable "bad" act of a corporation is not admissible, simply because punitive damages are at issue in an individual case. *BMW* clearly states that constitutionally permissible use of "repeated misconduct" as a basis for a punitive damage award is limited to the admission of evidence regarding "the existence and frequency of ***similar*** past conduct" for

the purpose of computing punitive damages. *BMW*, 517 U.S. at 577 (emphasis added). Thus, in the *BMW* case, this Court found that it was proper to consider only evidence of other customers who had experienced substantially similar failures by BMW to disclose pre-sale repairs. There is nothing in this Court's decisions remotely suggesting that due process allows a jury to impose punitive damages on a corporate defendant for alleged wrongful conduct that is factually and legally dissimilar and unrelated to the conduct complained of by the plaintiff.

In the instant case, however, the trial court placed virtually no limit on the nature and extent of evidence regarding State Farm's conduct and the Utah Supreme Court affirmed its "no holds barred" evidentiary decisions. The trial court did not limit the evidence to similar conduct as required by *BMW*. In fact, the court allowed the wholesale admission of evidence of a multitude of factually unrelated practices allegedly engaged in by defendant that had absolutely no identifiable relationship to the claims made by Mr. and Mrs. Campbell. Simply put, under the Utah Supreme Court analysis any and all conduct, no matter how factually dissimilar, no matter where or when it took place, can be alleged to be part of a "pattern" or "scheme".

The specific situation in this case was State Farm's handling of the defense of a "third-party claim" (a claim in which an insured is sued by parties who are not parties to the insurance contract)[2]. State Farm contested liability when its

2. As is explained in one of the leading treatises on insurance law,

> [i]n many insurance contexts ranging from principles of causation, to the varied post-loss duties addressed here, the courts recognize the conceptual and practical difference between "First party" insurance, which is a
>
> (Cont'd)

insured, Mr. Campbell, was sued by third parties following an automobile accident. Rather than settle for the policy limit demand made by plaintiff, State Farm decided the case should be tried. After Mr. Campbell was found to be 100% at fault in the accident, State Farm appealed. The judgments entered against Mr. Campbell following the trial were never executed and were paid by State Farm after the lower court's ruling was affirmed on appeal.

Mr. and Mrs. Campbell employed the same counsel who had sued them in the third party case. They subsequently sued State Farm[3], contending that State Farm's failure to settle

(Cont'd)

> contract between the insurer and insured protecting the insured's own actual losses and expenses, such as property insurance [and] "Third party" insurance, which is a contract to protect the insured from actual or potential monetary liability to a third party, such as liability insurance.

COUCH ON INSURANCE § 198.3 (3d Edition 1999).

> The most obvious distinction in the claims handling context is that first-party insurance, with the sole exception of title insurance, does not involve any need for, or duty to, defend the insured. Likewise, the concept of a "duty to settle" necessarily describes very different things when applied to a third-party claimant as opposed to a first-party context in which any settlement is with the insured or a beneficiary.

Id.

3. *See, e.g.*, STEPHEN S. ASHLEY, BAD FAITH ACTIONS § 10:03-10.05 (1996) (pointing out that practice of "setting up" insurance companies began in third-party context and giving elaborate instructions on conducting the "set up"); James Bauman, *Emotional Distress Damages and the Tort of Insurance Bad Faith, 46* DRAKE

(Cont'd)

the third party case within policy limits before trial was in bad faith.[4] During the portion of the trial pertaining to the liability of State Farm for compensatory and punitive damages, the trial court admitted evidence of a wide variety of nationwide conduct by State Farm that was completely unrelated temporally and factually to defendant's conduct in handling third party claims. Virtually all of said evidence of such purported "bad acts" took place outside of Utah and did not involve Utah residents.

For example, evidence was admitted by the trial court concerning State Farm's specification of non-original equipment manufacture (non-OEM) parts for the repair of its own insured's vehicles. This is a first party issue encompassing the duty of an insurer to its own insureds.[5]

(Cont'd)
L. REV. 717, 746 (1998) ("Knowledgeable plaintiff attorneys understand the need to 'set up' the liability insurer by making a policy limits demand, thereby triggering the insurer's duty to consider the interests of its insured."); Douglas R. Richmond, *An overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74, 130 ("In recent years lecturers at continuing legal education seminars have given advice on how to "set up" insurers for bad faith claims."); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1169 (1980) (Noting that plaintiffs "attempt to 'set up' insurers for excess liability claims under current duty-to-settle law").

4. The insurer's duty to settle is based on "the insurer's exclusive control over settlement negotiations, plus the inevitable conflict between the insurer's interest to pay as little as possible and the insured's interest not to suffer an excess judgment." COUCH ON INSURANCE § 203:13 (3d Edition 1999). Obviously, the insurer's decision is a difficult one, based on the vagaries and uncertainties of the jury system. Most courts have found that an insurer "must settle within policy limits where there is a substantial likelihood of recovery in excess of those limits." *Id.*

5. "Unlike the third-party case, first-party bad faith inherently involves the insurer's refusal to pay a claim of its own insured on (Cont'd)

There was no showing that State Farm's conduct was in violation of any insurance regulation or statute in any of the states in which the practice had occurred. Most significantly, there was absolutely no connection between the specification of non-OEM parts for repair of vehicles in a first party context and the Campbell's bad faith claim for failure to settle a third party personal injury lawsuit within policy limits.

The trial court also admitted evidence regarding the use of "first contact" settlements, i.e. settling a case with an insured at the first meeting between State Farm and its insured. As with the non-OEM conduct, this first party practice was not demonstrated to be in violation of any regulation or statute in any of the states where this conduct allegedly occurred. In fact, State Farm's settlement of claims with its own insureds was, again, completely unrelated to the bad faith failure to settle a third party claim brought by Mr. and Mrs. Campbell.

The trial court went on to list a wide variety of first party insurance practices on such disparate issues as the use of appearance allowances for hail damage claims in Colorado, the use of high-low settlement agreements in California, and the use of independent medical examiners in Arizona, Texas and Hawaii. None of these practices are illegal in the states where they occurred and thus could not be constitutionally acceptable bases for punitive damages under *BMW*. The court even allowed evidence wholly unrelated to insurance claim issues regarding alleged discrimination by State Farm against

(Cont'd)
the ground that it is not within the coverage, is overstated, or has not yet been adequately proved." COUCH ON INSURANCE § 204:28 (3d Ed. 1999). The standard regarding the alleged justification for an insurer's non-payment is the "fairly debatable" standards. *Id.* "A 'debatable reason', for purposes of determining whether a first-party insurer may be subjected to bad-faith liability, means an arguable reason, a reason that is open to dispute or question." *Id.*

women, newlyweds, the elderly, minorities and the poor. No nexus between such evidence and the Campbells' claim was even offered.

Other evidence purportedly supporting punitive damages also included class action lawsuits involving complex regulatory and first party claims issues in states other than Utah that were not in any way related to State Farm's conduct in handling third party claims in Utah. Again, Mr. and Mrs. Campbell made no allegations (nor could they) in their bad faith lawsuit that State Farm committed any of the above-listed conduct in the handling of their third party claim[6]. The reason is simple — none of the conduct involves third-party claims practices, good or bad, and thus the conduct has nothing to do with the handling of the settlement of the claim against Mr. Campbell.

By allowing admission of evidence of a variety of disparate conduct that most certainly did not involve plaintiffs, the trial court violated State Farm's basic due process rights guaranteed by the 14th Amendment. Instead of defending itself against claims of bad faith failure to settle third party claims, State Farm was forced to defend every conceivable form of business conduct, from the esoteric (non-OEM parts), to the inflammatory (discrimination allegations). There was simply no way for State Farm to effectively defend its conduct on every single type of controversial practice or alleged wrongdoing by an employee

6. It is important to note that the litany of alleged practices that plaintiffs introduced into evidence against State Farm *are separate and distinct from each other.* Even a cursory review of the vastly dissimilar conduct alleged to have been improper demonstrates that there is not even a nexus between and among such practices which meets the due process standard of similarity for admissibility under *BMW*.

or agent, nor should it have been required to do.[7] It is inconceivable that conduct legal in the state where it occurs could provide the foundation for an award of punitive damages elsewhere; however, this is exactly what the decision below embraces. More importantly, the constitutional protections of the due process clause are in place to prevent such an impossible and patently unfair task.

The impact of the Utah Supreme Court's ruling in Campbell, if affirmed, is far-reaching and would render corporations virtually defenseless in cases in which punitive damages are sought. Corporations would be forced to defend their broad-based business practices with regard to every unrelated "bad" act they ever engaged in, but also including legal practices that might offend the sensibilities of jurors, without any time or geographic constraints. Under the Utah Court's ruling, a plaintiff would be allowed to enter evidence of alleged corporate misconduct, no matter how unrelated to the claims of that particular plaintiff, as long as the plaintiff linked all the practices together by calling it a "pattern" or "scheme" — even if the "pattern" or "scheme" was nothing

7. It should not be overlooked that the evidence introduced by plaintiff of State Farm's conduct covered over 20 years. Not only was this evidence dissimilar to the conduct complained of by plaintiffs, it was also remote in time. Even if the dissimilar out-of-state conduct alleged by plaintiff took place, and even if such conduct was in some way offensive to the jurors, much of the "evidence" was simply too remote in time to be relevant or reliable. As such, it was improper for the Utah Supreme Court to punish State Farm based, even in part, on alleged conduct that is as much as 20 years removed from the conduct purportedly directed to plaintiffs.The further removed in time the proffered evidence of the "pattern" or "scheme" is from the acts directed to plaintiffs, the more similar it must be, keeping in mind that if too far removed it can no longer be considered evidence of a "pattern" or "scheme" at all. This analysis is not helpful here, as the alleged "pattern" or "scheme" evidence proffered did not meet even the minimum constitutional threshold of similarity under *BMW*.

more than a contention that the corporation was doing such acts as a part of its mission to turn a profit for its shareholders. The glue which holds the "scheme" together is profit, which is the overarching goal of most businesses, without which they would all cease to exist. Thus, virtually any act which could lead to a profit can be labeled a "pattern" or "scheme". All conduct, even legal conduct in other states remote in time becomes fodder for punitive damage submissions. Such an approach requires only the plaintiff's counsel spin-doctor divergent business practice as putting profit above all else. This cannot be the law. If it becomes the law, the economic crisis it portends has seen no equal.

The following examples demonstrate the absurdity of the Utah Supreme Court's Position, when applied to other types of corporate defendants. If a consumer is suing an auto manufacturer on a warranty theory claiming that the paint faded after only 10 months of exposure to the elements in violation of a written warranty there is no basis to admit evidence that it closed a factory down the street, laying off thousands of workers, to increase or at least to attempt to make a profit. Clearly this is lawful conduct but still might inflame a jury. Similarly, if a pharmaceutical manufacturer is sued for age discrimination, evidence of alleged improper conduct with regard to its reporting of adverse events on a prescription drug that was ultimately recalled, should not be admissible, no matter how egregious the conduct of the company with regard its failure to report.

Simply put, the conduct complained of by a plaintiff **limits** the type of evidence that is admissible for the purposes of awarding and computing punitive damages. The *BMW* case clearly states this principle, requiring substantial similarity between the evidence admitted and the wrongful act allegedly committed with respect to plaintiff. The Utah Supreme Court failed to heed this requirement. Fundamental due process is

violated when a corporate defendant is forced to defend against wide-ranging allegations of wrongdoing that have no nexus to the facts of the case at bar.

B. The Utah Supreme Court's Admission of Out-of-State Conduct Evidence Impermissibly Exceeds the Mandate of this Court in *BMW*.

The federal inquiry into the excessiveness of a punitive damage award "appropriately begins with an identification of the state interests that a punitive award is designed to serve." *BMW*, 517 U.S. at 568. Due process requires that an award must be reasonably related to a State's interest in deterring and punishing unlawful conduct against its consumers for actions taken within its borders, as opposed to attempting to change the defendant's conduct in other states. *Id.* at 568-74. Due process protects a corporate defendant from having to defend lawful actions that took place outside the forum state for purposes of determining the computation of punitive damages. *Id.* at 574.

This Court has held that evidence of out-of-state conduct is only admissible if it is substantially similar to the conduct complained of by plaintiff (such as pre-sale repair of the plaintiff's car in the *BMW* case) and only then to assess the reprehensibility of the conduct involved. Such evidence is admissible for the sole purpose of attempting to assess the degree of reprehensibility of the defendant's conduct for purposes of determining the amount of punitive damages not as an independent basis for imposing punitive damages. Unfortunately, the Utah Supreme Court seemed to get it backwards, justifying as the foundation for punitive damages a wide variety of unrelated and dissimilar conduct that did not take place in Utah. Further, the Utah Supreme Court's decision stretched the bounds of credulity by admitting evidence of differing insurance practices that were legal in

the states in which the conduct occurred, in clear violation of the *BMW* prohibition on attempting to punish a defendant for lawful behavior in another state. Frankly, without the extraterritorial evidence it is inconceivable that a jury would have been so inflamed as to award 145 million dollars.

The due process limits on the admissibility of out-of-state conduct evidence is governed by the fundamental requirement that the evidence be substantially similar to the act complained of by the plaintiffs, even if the conduct alleged would be illegal in the foreign state.[8] Instead of limiting the admission of such unrelated or dissimilar evidence, the Utah Supreme Court allowed an endless parade of testimony on conduct that had nothing to do with the issue in the Campbell lawsuit, which did not take place in Utah, and without any temporal relationship to the acts complained of. The artifice of labeling such dissimilar conduct as a "pattern" or "scheme" does not magically convert unrelated, out-of-state evidence occurring over 20 years into "similar" practices. Due process clearly does not allow such a subterfuge to take the place of the legitimate and critical evidentiary gatekeeping function of the judiciary. Obviously, when State Farm was put on trial for 20 years of simply being State Farm, it was virtually

8. The Utah Supreme Court's decision to allow admission of out-of-state conduct that is legal in the foreign state is also disturbing in that it aggressively encroaches upon the constitutional principle of comity and full faith and credit. In effect, Utah is punishing State Farm for conduct that is legal in another state. In doing so, Utah is *not* granting full faith and credit to the laws of these foreign states. Rather, Utah is punishing State Farm for conduct that is either legal, or, at least, not prohibited, in the state where the conduct occurred. The Utah Supreme Court should not be allowed to effectively apply Utah law to extraterritorial conduct. Utah must give full faith and credit to the statutes and regulations of foreign states. In order to do this, Utah must not admit evidence of out-of state conduct that is either legal or not prohibited in that state for purposes of awarding and/or calculating punitive damages in Utah.

impossible to adequately and effectively defend each and every allegation of wrongdoing.

II. The Punitive Damages Award Which Bears a Ratio of 145 to 1 Has No Reasonable Relationship to the Compensatory Award; Likewise it Bears No Rational Relationship to the Civil or Criminal Penalties Available, and, If Left Standing, Likely Will Foster Other Unreasonably Excessive Awards.

The verdict in this case is excessive under the standards set forth in *BMW*. The punitive award of $145 million is roughly 145 times higher than the remitted compensatory award to plaintiffs. Any fair reading of the *BMW* factors would render such an award excessive.

In determining whether a punishment is grossly disproportionate to the gravity of a tortfeasor's behavior, this Court identified three separate but interrelated guideposts that must be considered: (a) the degree of reprehensibility of the tortfeasor's conduct; (b) the disparity between the harm or potential harm suffered by the injured party and the punitive damages awarded; and (c) the difference between this remedy and the **civil or criminal penalties authorized or imposed in comparable** cases. *BMW*, 517 U.S. at 574-75. Without question, this Court intended that these guideposts protect a tortfeasor's constitutional right to receive fair notice not only of the conduct that would subject the tortfeasor to punishment, but also of the severity of the penalty that could be imposed. *Id.* at 575. By upholding an award of punitive damages with a ratio of 145 times actual damages, the Utah Supreme Court endorsed an unconstitutional ratio of grossly excessive proportions.

Although it is true that there is no mathematical formula that is routinely applied to measure the proper ratio, punitive damages must bear a "reasonable relationship" to the compensatory damages. *Id.* at 580. Furthermore, the Court

concluded in a prior case that a punitive damages award of "more than 4 times the amount of compensatory damages" might be "close to the line." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991).[9] Similarly, this Court upheld a ratio of not more than 10 to 1 when the punitive award was compared to the harm that might have been caused if the tortious plan had succeeded. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993).

Courts of appeal applying the BMW factors have held that punitive damages awards in the range of 12 to 50 times actual damages to be **constitutional**.[10] But appellate courts have also concluded that ratios of 14.89 to 1, 30 to 1, 100 to 1, and 320 to 1 were unconstitutionally excessive.[11]

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9. In Utah, even prior to *BMW*, 'the general rule' is that ratios above 3 to 1 for smaller awards (below $100,000) are excessive, and that the acceptable ratio appears lower than 3 to 1 for larger awards (above $100,000). *Utah Foam Products Co. v. The Upjohn Company*, 930 F.Supp. 513, 526 (D. Utah 1996) (citations omitted). Obviously, the award in this case greatly exceeds the ratios previously set forth as acceptable by state courts in Utah even prior to *BMW*.

10. *See Bielicki v. Terminix Int'l Co., L.P.*, 225 F.3d 1159 (10th Cir. 2000) (upholding a ratio of 12 to 1 where plaintiffs suffered permanent, chronic injuries from defendant's employee's spraying of toxic pesticides in their presence); *Grabinsky v. Blue Springs Sales, Inc.*, 203 F.3d 1024 (8th Cir. 2000), *cert. denied*, 531 U.S. 825 (2000) (affirming approximate ratio of 27 to 1 on numerous violations of the Missouri Merchandising Practices Act); *Romano v. U-Haul Int'l*, 233 F.3d 655 (1st Cir. 2000) (finding ratio of 19 to 1 to be constitutionally acceptable in a Title VII action); *Jeffries v. Wal-Mart Stores, Inc.*, 2001 U.S. App. LEXIS 16753 (6th Cir. 1998) (refusing to remit punitive damages of $2,500 when only $1 in compensatory damages had been awarded on plaintiff's Title VII claim).

11. *Watkins v. Lundell*, 169 F.3d 540 (8th Cir. 1999), *cert. denied*, 528 U.S. 928 (1999) (reducing punitive from $3.5 million to $940,000 when actual damages awarded were $235,000 on breach (Cont'd)

If this punitive damage award is allowed to stand, defendants across the country will be faced with the virtually impossible task of distinguishing the award here, each time a plaintiff cites *Campbell* in support of an egregiously excessive punitive award. Undeniably, if it is concluded these facts and conduct in *Campbell* support punitive damages 145 times higher than an already significant compensatory damages award, this Court's decisions in *BMW* and *TXO* are rendered meaningless — there will remain no constitutional protection for a defendant in a punitive damage claim.

Furthermore, the Utah Supreme Court's decision allowed a punitive damage award based on a voluminous and virtually unlimited amount of evidence of alleged bad acts of State Farm that took place outside the state of Utah and which, because of their nature, most certainly did not happen to the plaintiffs. This evidence was improperly admitted, and substantially prejudiced the jury's determination of the reprehensibility of State Farm's conduct.

(Cont'd)
of contract and fraud claims because conduct that justified a 4 to 1 ratio was not reprehensible enough to support a 1489 to 1 ratio); *Rubinstein v. Administrators of the Tulane Educ. Fund*, 218 F.3d 568 (5th Cir. 2000) *cert. denied*, 121 S. Ct. 1393 (2001) (reducing punitive damages of $75,000 to $25,000 when actual damages for a single act of retaliation under Title VII awarded were $2,500 because the facts, analyzed under *BMW*, did not justify a ratio of 30 to 1, but could support a ratio of 10 to 1); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (finding an award of $5 million in punitive damages, previously reduced from $50 million, excessive and reducing punitive award to $350,000 on plaintiff's hostile work environment and constructive discharge claims); *Johnson v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir. 1999), *cert. denied*, 528 U.S. 931 (1999) (reducing a punitive damages award of $15 million to $4.35 million when the aggregate actual damages were $47,000 because a ratio of 320 to 1 was excessive and the 100 to 1 ratio was the maximum permitted by the constitution).

Cumulatively, such evidence was likely to and did inflame the jury's passions against State Farm, despite the fact that such conduct had nothing to do with plaintiffs or their claim. This is exactly why plaintiffs needed to and did overreach in terms of the evidence offered, because if only relevant and constitutionally admissible evidence were offered as mandated by *BMW*, there would likely have been no punitive damage award.

If the court had properly limited the evidence to similar conduct, the jury would have seen that not a single State Farm insured had ever paid any money on an excess judgment in Utah, and, in fact, only the Campbell's were ever subject to that remote possibility. In essence, out of the 29,497 third party claims handled in Utah between 1980 and 1994 by, State Farm, only 438 claims were tried to a verdict. Of these 438 cases, 396 resulted in a finding of either no liability or a verdict lower than State Farm's offer. Only seven claims resulted in an excess verdict, all of which were resolved so that the insureds did not pay a dime. Obviously being right such a high percentage of the time is not and could be shown to be a "pattern" of conduct that is willfully wrong. Depending on how one defines being right, the evidence at the low end shows defendant was right, 431 out of 438 times, (98.6%) or at the high end 29,496 out of 29,497 times (99.9966%). This incredibly high success rate occurred in the difficult decision making milieu of contested liability and sometimes speculative damages. Evaluating settlement of any claim or lawsuit is an exceeding complex process involving difficult factual analysis, legal acumen, as well as a multiplicity of intangible factors. Plaintiffs obviously recognize that defendant's conduct, which actually could be constitutionally described as similar, was not likely to inflame the jury or result in punitive damages. Undoubtedly, instead they took every act that they thought a jury might find offensive, even if legal, and labeled it part of the "pattern"

or "scheme". Constitutionally similar conduct in no way would have shown a pattern of reprehensible conduct necessary to support punitive award of $145 million.

BMW also recognizes that a punitive award should be compared to the civil or criminal penalties that "could be imposed for comparable misconduct" as a part of the Court's review of the excessiveness of a punitive damages award. *BMW*, 517 U.S. at 583. Again, this relates to the due process principle that a defendant must have fair notice of the potential severity of a penalty for a given action or course of conduct.

Obviously, State Farm would not be subject to civil or criminal penalties in Utah for out-of-state conduct. Rather, it is State Farm's conduct with respect to the Campbells that would be the basis for any potential civil or criminal penalty in Utah. A Utah court simply does not have jurisdiction to punish State Farm's conduct that occurred outside of Utah. Because the Utah court considered the out-of-state evidence in awarding punitive damages, State Farm was subject to a penalty in Utah that was tainted from the outset and which was catapulted by unconstitutionally inflammatory evidence to an amount well beyond that contemplated by a comparable civil or criminal penalty.

State Farm would be subject to civil or criminal penalties for their conduct with respect to the Campbells, and any "comparable conduct" under the Utah Unfair Claims Practices Act. Utah Code Ann. §§ 31A-26-301, *et seq.* As was previously stated in this brief, State Farm never had an excess verdict against any insured in a third party situation in Utah, which created any risk of personal loss to that insured. State Farm thus could only be aware of the Campbell situation as a situation giving rise to a potential penalty.

Furthermore, the penalty for violation of the Utah statute was, at most, a single $10,000 fine, which is 14,500 times less than the $145 million punitive award in this case.

In *BMW*, this Court found that defendant BMW could have been punished by a single fine of up to $2,000 for a violation of the Alabama Deceptive Trade Practices Act. The punitive award of $2 million was 100 times greater than the maximum fine, and was a significant factor in this Court's determination that the $2 million punitive award was excessive. Clearly, a punitive award that is 14,500 greater than the maximum penalty provided for under Utah law is grossly excessive. State Farm did not have "fair notice" that it could be subject to such an award for its conduct with respect to the *Campbells* in this case.

If the punitive award in this case is allowed to stand, corporate defendants would be liable for punitive awards, such as the award in this case, that bear no reasonable relationship to the level of punishment that could be imposed on the corporation by the state in which the conduct occurred. The Utah Supreme Court's ruling would run roughshod over the criminal penalties enacted by the legislature, turning juries into vigilantes, with free reign to punish any and all conduct both within and without the borders of Utah. Such a result violates the basic principles of due process guaranteed to all citizens, including corporations.

III. Trial Court's Must Utilize Their Role As "Gatekeepers" to Properly Limit the Introduction of Evidence Regarding Punitive Damages under Well-Defined Standards

Under *BMW* it is clear that only "similar" conduct is admissible to show the degree of reprehensibility of a defendant's conduct. The Utah Supreme Court's decision,

however, glossed over the rule imposed under of *BMW* by improperly characterizing disparate conduct as a "pattern" or "scheme", and allowing in a plethora of unrelated evidence for the purposes of imposing punitive damages on State Farm. Corporations should not be subject to such strategic gamesmanship by plaintiffs, misinterpreting, intentionally or otherwise, the proper standards for admissibility of evidence and thus whether such an award can pass due process scrutiny.

Additional guidelines need to be set forth by this court so that trial and appellate courts can appropriately identify the specific nature and type of evidence admissible as "similar conduct" in support of punitive damages. Trial judges must serve as gatekeepers, and properly restrict the plaintiff's attempts to inflame the jury by admitting evidence of corporate conduct that is in no way similar to the situation which the plaintiff, in the case at bar, finds himself or herself.

In order for evidence of *in-state* conduct to be admissible, the conduct should be "substantially similar" to the alleged wrongful conduct directed at the plaintiff. The trial court should look at the evidence of other alleged corporate misconduct, considering the following factors: (1) is the conduct in some way wrongful; (2) are the same class of persons involved; (3) are the allegations of corporate misconduct of the same type and nature as alleged by plaintiff; (4) did the alleged corporate misconduct cause similar type and/or degree of injury as was suffered by plaintiff and; (5) is there a close temporal relationship between the "similar" conduct relied on and that allegedly suffered by plaintiff[12]. If such questions can be answered in the affirmative, it is more likely that the prior conduct by the corporate defendant has sufficient similarity to the case at bar to be considered on the issue of the reprehensibility of the corporation's conduct.

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12. For further discussion of the point see footnote 7.

In order for evidence of *out-of-state* conduct to be admissible, the conduct should be "virtually identical" to the conduct complained of by the plaintiff in the case at bar. This higher standard should include all of the factors listed above, with an eye toward further limiting the behavior of the corporation to virtually an identical situation. In addition, evidence of extra-territorial (out-of-state) conduct should never be admissible if such conduct is legal in the state in which the conduct occurred. For example, consider the situation of an automobile manufacturer regarding emission control standards for its cars. California imposes its own stricter standards that are not in force in the other 49 states in the Union. In an action in state court in California, in which the allegations were that the auto manufacturer's cars did not meet the California emission standards, it would be a violation of due process to allow evidence of the auto manufacturer's level of emissions in states outside of California. Clearly, a defendant should not have to defend itself against punitive damages for conduct lawful in all other states.

This Court should set clear and strong governing standards that require trial courts, and appellate courts in their *de novo* reviews, to carefully scrutinize such evidence to ensure that it is truly similar. The Utah Supreme Court's decision grossly undermines this Court's attempts to limit the introduction of unfair, irrelevant and inflammatory evidence in a punitive damage case and should be reversed, with clear instructions to the lower court regarding the limitations that should be placed on such unfairly prejudicial evidence, that when admitted, violates the due process rights of a defendant.

CONCLUSION

For the foregoing reasons, this Court should reverse the Utah Supreme Court's reinstatement of the $145 million punitive damage award, remanding the case for a new trial on the issue of punitive damages in accordance with proper constitutional limitations.

Respectfully submitted,

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